Filed 11/29/16 P. v. Green CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. TOYRION GREEN, Defendant and Appellant.	B268500 (Los Angeles County Super. Ct. No. TA131223)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allen J. Webster, Jr., Judge. Affirmed as modified.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, John Yang, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Toyrion Green (defendant) for the crimes of attempted murder, shooting at an occupied motor vehicle, and making a criminal threat. The prosecution's evidence at trial established he shot at a vehicle occupied by victim Jonisha Baker (Baker) and three others. The parties agree the personal use of a firearm sentencing enhancement defendant received in connection with his shooting at an occupied motor vehicle conviction must be stricken. Thus, we are called to decide only two contested issues. First, we consider whether there is sufficient evidence to support defendant's criminal threat conviction, specifically as to the element that requires proof that his threat caused Baker to be in sustained fear for her own safety. Second, we consider whether the trial court improperly denied defendant's motion for a new trial, which argued his trial attorney was constitutionally ineffective.

I. BACKGROUND

Los Angeles County Sheriff Gang Investigator Julius Gomez (Gomez) testified as a gang expert at defendant's trial. He testified defendant identified himself as a member of the Carver Park Crips gang, with the gang moniker of "Turtle or Turk," in a prior contact with Gomez. During her testimony, Baker also described defendant, who she knew "through [her] brothers," as a person who affiliates with the Carver Park crips gang.

On the evening of August 28, 2013, a group including Baker and Jasmine Ellis (Ellis) plus three others (the Ellis group) were "hanging out" on the street in front of a house on Laurel Street in Compton. Baker and Ellis overheard an argument "down the street" in which a woman, who was not a member of

the Ellis group, said "fuck their hood" and "they dead homies," referring to the Carver Park Crips gang. Defendant, who was on the street at the time, heard these comments. He moved to cross the street in the direction of where the "fuck their hood" comment came from until "some girl" stopped him by grabbing his arm. Defendant then walked away from the scene of the argument toward a house.

Shortly thereafter, a car pulled up beside Baker and the Ellis group, and defendant was in the passenger seat. Defendant jumped out of the car and asked "which one of you bitches dissed my hood?" In response, Baker and those in the Ellis group denied making any disrespectful comments. Defendant then said, "Yeah. All right. I am going to shoot this mother fucker up." Defendant then got back in the car, and it drove away.

Baker drove away very soon after defendant said he would shoot the area up. She returned to the area 10-20 minutes later, only after calling Ellis to see if "anything [was] going on over there" and hearing Ellis say "no." Once back in the area of Laurel Street, Baker resumed socializing with the Ellis group around the driver's side area of her (Baker's) car. A car then pulled up near the group, and defendant was in the passenger seat. Defendant got out of the car with a gun and fired approximately six shots, one of which hit Baker's car.

Later at trial, when asked on direct examination if defendant's "I am going to shoot this mother fucker up" statement made her afraid, Baker said it did: "Yeah. I left off the street. I was afraid. [I] didn't know what was going on." In response to the next question asked on direct examination, Baker explained that "[she] didn't think nothing was going to happen, but [she] did leave the street just in case something did happen."

On cross-examination, Baker was again asked if she felt threatened when defendant jumped out of the car. She said, "No, cause, I didn't do nothing."

II. DISCUSSION

We affirm defendant's Penal Code section 422[1] criminal threat conviction because substantial evidence supports the jury's finding that Baker was in sustained fear for her safety after defendant said he would shoot up the area where she and the Ellis group were standing. Baker testified to being afraid, and she also left the location where defendant threatened her and did not return until getting an "all clear" some 10-20 minutes later. Baker also knew defendant was a gang member, and a jury could properly infer this gave her further reason to fear defendant under the circumstances.

The trial court properly denied defendant's new trial motion arguing the failure to call two alibi witnesses constituted ineffective assistance of counsel. The record reveals defense counsel made a quite reasonable tactical decision not to call the witnesses after investigating what they would say on the witness stand and determining their testimony may well have hurt, rather than helped, defendant's case.

Finally, the Attorney General concedes, and we hold, the section 12022.5 firearm enhancement imposed in connection with defendant's discharge of a firearm conviction must be stricken because use of a firearm is an element of the underlying offense of shooting at an occupied vehicle.

---

[1] Undesignated statutory references that follow are to the Penal Code.

A. Sufficiency of the Evidence to Support the Criminal Threat Conviction

1. Standard of review

"'"[W]e review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] We determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] In so doing, a reviewing court "presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." [Citation.]'" (*People v. Williams* (2015) 61 Cal.4th 1244, 1281.) "It is well settled that, under the prevailing standard of review for a sufficiency claim, we defer to the trier of fact's evaluation of credibility." (*People v. Richardson* (2008) 43 Cal.4th 959, 1030.)

2. There is substantial evidence Baker was in sustained fear as a result of defendant's threat

To convict a defendant for making a criminal threat in violation of section 422, the prosecution must establish: "(1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the

circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228 (*Toledo*).)

Defendant contests only the fourth of these elements, namely, whether defendant's threat caused Baker to "be in sustained fear for . . . her own safety." (§ 422, subd. (a).) "[P]roof of a mental element in the victim" is required to sustain a conviction under section 422. (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156 (*Allen*).) The individual threatened "must actually be in sustained fear." (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1140.) While statutorily undefined, courts have interpreted sustained fear as "a period of time 'that extends beyond what is momentary, fleeting, or transitory.'" (*Id.* at p. 1140; see also *People v. Wilson* (2015) 234 Cal.App.4th 193, 201.) The victim's knowledge of the defendant's prior conduct is relevant to establish the threat caused the victim to be in "sustained fear." (*Allen*, *supra*, at p. 1156.)

Baker's trial testimony chronicling her mental state and her actions subsequent to defendant's threat constitutes substantial evidence on which the jury could rely to find she was in sustained fear for her personal safety. Initially, Baker witnessed defendant react to what he perceived as comments disrespecting his gang. Shortly thereafter, defendant jumped out of a car and confronted Baker and the others with her, believing

someone in her group to be the woman who made the remarks seen as disrespectful. Defendant said he would "shoot this mother fucker up," and Baker testified defendant's comments made her "afraid." Her actions thereafter corroborated her asserted mental state: she almost immediately drove away from the area, only returning 10-20 minutes later after calling Ellis to confirm nothing "was going on over there." (Cf. *People v. Iniquez* (1994) 7 Cal.4th 847, 857 ["'Fear' may be inferred from the circumstances despite even superficially contrary testimony of the victim"].)

Defendant argues the evidence was nevertheless insufficient by contrasting the facts here with those in *People v. Fierro* (2010) 180 Cal.App.4th 1342. In that case, the victim testified to being "'in fear for his life[,]'" as a result of a minute-long incident in which the defendant confronted the victim and his son at a gas station and repeatedly threatened to kill them while displaying what the victim believed to be a gun in his waistband. (*Id.* at pp. 1345-1346.) The *Fierro* victim testified to being "'scared to death during the whole ordeal[,]'" and he called the police 15 minutes after the incident when he thought he "'was out of harm's way.'" (*Ibid.*) The *Fierro* court held the victim was in sustained fear because either the 15 minute period between defendant's threat and the victim's 911 call or "the minute during which [the victim] heard the threat and saw appellant's weapon qualifies as 'sustained' under [section 422]." (*Id.* at p. 1349.)

Fierro does not establish an evidentiary floor that facts in all other cases must meet to demonstrate a victim was in sustained fear for purposes of section 422. Rather, the question of sustained fear is one for a factfinder to assess in each individual case, and here defendant issued a threat to shoot

Baker and her group and then drove away. Baker knew defendant was a gang member who believed her group had disrespected his gang, and she testified she was afraid.[2] Her decision to vacate the area—for approximately the same interval of time found sufficient in the *Fierro* case defendant cites—illustrates her fear was not "momentary, fleeting or transitory." Under the applicable standard of review, there was sufficient evidence to support defendant's section 422 conviction. (*People v. Williams*, *supra*, 61 Cal.4th at p. 1281.)

B. Motion for New Trial Alleging Ineffective Assistance of Counsel

Defendant argues the trial court wrongly denied his motion for a new trial, which argued his trial attorney was constitutionally ineffective in declining to call two alibi witnesses to testify. We reject the argument because defendant has not shown his attorney's performance was deficient.

1. The motion, and the trial court's ruling

When filing his new trial motion, defendant submitted the declarations of Antoinette Walker (Walker), defendant's mother, and Myeshiea Wright (Wright), a family friend.

---

[2] That Baker arguably testified inconsistently on cross-examination (i.e., she did not feel threatened because she did not "do nothing") does not alter our analysis. The jury's task was to resolve such potential conflicts in the testimony (CALCRIM No. 226 ["You may believe all, part, or none of any witness's testimony"]), and we defer to the conclusion the jury necessarily reached. (*People v. Richardson*, *supra*, 43 Cal.4th at p. 1030.)

Walker declared defendant had spent the entire evening of August 29, 2013, at her house on West 97th Street in Compton, because he was ill.[3] She conceded she left her home at 8:00 p.m. on the evening in question and did not return until 1:00 a.m. the next morning. But Walker maintained that Myeshiea Wright was at her house with defendant the entire time she was away, and she communicated this alibi information to defendant's attorney and investigator during trial.

Wright declared she arrived at Walker's house around 7:30 p.m. on the (ostensible) evening in question and that defendant was present. She stated she remained at Wright's house for the remainder of the evening and defendant did not leave the residence during that period. During defendant's trial, Wright met with defendant's lawyer and a defense investigator and indicated her willingness to testify that defendant was with her on the evening in question. Wright was never called to testify.

The trial court held a hearing on defendant's motion for a new trial, and defendant's attorney testified. She explained she had interviewed Walker "several times" before trial regarding defendant's whereabouts on the evening in question. She attempted to corroborate Walker's statements, but had been

---

[3] Both declarations refer to the events in question as having occurred on August 29, 2013. However, the charged criminal threat offense occurred on August 28, 2013. This discrepancy alone is reason enough to deny defendant's new trial motion; after all, an alibi witness who provides an alibi for the wrong day cannot have helped the defense. Nevertheless, the parties litigated the matter in the trial court as if the declarations referenced the correct date, and we analyze the issue on that basis as well for the sake of completeness.

unable to do so. In particular, defendant's attorney believed Walker's statements regarding who was with defendant at the time of the incident "lacked credibility." Based on her investigation, defendant's attorney decided not to call Walker as a witness.

Defendant's trial attorney met Wright, the other potential alibi witness, for the first time at the courthouse cafeteria close to the end of trial. Following a very brief conversation, and because she was busy "working on the trial," defendant's attorney referred Wright to her defense investigator for further follow up. The defense investigator interviewed Wright in the courthouse cafeteria and communicated Wright's statements, and his own impressions of Wright, to defendant's attorney. Defendant's lawyer decided Wright was not credible based on the content of what she told the investigator, which was apparently contradicted by other evidence uncovered during the defense investigation. Defendant's trial attorney testified she believed Wright "was not telling the truth" and would be "eat[en] up alive" on cross-examination.

The trial court denied defendant's new trial motion. The court found the alibi evidence unsubstantiated, noting the Ellis group knew defendant prior to the shooting and identified him at the scene, and that "this whole notion he was at home sick is really fiction." The court also noted Wright only came forward with her potential alibi evidence the day before closing argument. The trial court found defendant's attorney "basically did a reasonably competent job," and that defendant had not demonstrated he received ineffective assistance of counsel.

2. Standard of review

We evaluate the trial court's denial of defendant's new trial motion alleging ineffective assistance of counsel using a mixed standard of review. (*People v. Taylor* (1984) 162 Cal.App.3d 720, 724-725.) We uphold the trial court's express or implied factual findings if they are supported by substantial evidence. (*Id.* at p. 724.) "[A]ll presumptions favor the trial court's exercise of its power to judge the credibility of witnesses, resolve any conflicts in testimony, weigh the evidence, and draw factual inferences." (*Ibid.*) We exercise our independent judgment to determine whether, on the facts so found, defendant was deprived of his constitutional right to effective assistance of counsel. (*Id.* at p. 725.)

3. Defendant's trial attorney was not constitutionally ineffective

"'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 217.)'" (*People v. Carter* (2005) 36 Cal.4th 1114, 1189.) We presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel." (*Ibid.*)

When we consider the first prong of an ineffective assistance of counsel claim, i.e., whether an attorney's performance fell below prevailing professional norms, we "accord great deference to counsel's tactical decisions" at trial. (*People v. Frye* (1998) 18 Cal.4th 894, 979.) Decisions about what witnesses to call are "matters of trial tactics and strategy which a reviewing court generally may not second guess." (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1059; accord, *People v. Bolin* (1998) 18 Cal.4th 297, 334 [deciding whether to call certain witnesses is a matter of trial tactics, unless that decision results from an unreasonable failure to investigate].)

Defendant argues there "was no cogent tactical reason not to present Walker's and/or Wright's exculpatory alibi evidence" because the defense theory of the case was that defendant was not present at the crime scene. However, the record indicates defendant's attorney made her decision not to call either witness due to her doubts about their credibility and a fear that Wright may hurt defendant's case if cross-examined.

We see no basis to conclude the trial court erred in denying defendant's new trial motion. The value of Walker's declaration is negligible because she was not at home at the time the incident occurred; instead, her proposed testimony depends entirely on Wright's account. As to Wright, she did not come forward as a potential alibi witness until late in the trial, and her assertion that she was with the defendant on the evening in question was contradicted by the statements of another potential witness who claimed to have been with defendant that same evening. Defendant's trial attorney reasonably investigated the claims made by both potential alibi witnesses and made a tactical decision that we will not second guess.

C. The Section 12022.5 Firearm Enhancement Must Be Stricken

Section 12022.5 provides, in pertinent part, "any person who personally uses a firearm in the commission of a felony . . . shall be punished by an additional and consecutive term of imprisonment . . . *unless use of a firearm is an element of that offense*." (§ 12022.5, subd. (a), italics added.) The jury found this enhancement true as alleged in connection with defendant's section 246 conviction for discharge of firearm at an occupied vehicle. In sentencing defendant, the trial court imposed a four year prison term for the section 12022.5 enhancement in addition to the 10-year sentence for the underlying offense.

The Attorney General concedes imposition of the enhancement was erroneous and we accept the concession. Because firearm use is an element of defendant's underlying section 246 offense, section 12022.5 forbids imposition of the enhancement in this case. (*People v. Kramer* (2002) 29 Cal.4th 720, 723, fn. 2.) We order the enhancement stricken. (*People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1094, fn. 3.)

DISPOSITION

The four-year sentence enhancement imposed pursuant to section 12022.5 is stricken. The superior court is directed to prepare an amended abstract of judgment to reflect this modification and to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

TURNER, P.J.

KRIEGLER, J.